



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2020–0050; FF09E21000 FXES11110900000 212]

RIN 1018–BF01

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl; Delay of Effective Date

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule; delay of effective date and request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, are delaying the effective date of a final rule we published on January 15, 2021, revising the designation of critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (ESA) (January 15, 2021, Final Rule). In addition, this action opens a 30-day comment period to allow interested parties to comment on issues of fact, law, and policy raised by that rule and whether further delay of the effective date is necessary.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the effective date of the final rule that published on January 15, 2021, at 86 FR 4820, is delayed from March 16, 2021, to April 30, 2021.

Comment Period: To be assured consideration, comments must be received or postmarked by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments using either of the following methods:

Electronically via the Federal eRulemaking Portal: Please visit <https://www.regulations.gov>. In the Search Box, enter FWS–R1–ES–2020–0050, which is the docket number for this action, and click “search” to view the publications associated with the

docket folder. Locate the document with an open comment period and follow the instructions to submit your comments prior to the close of the comment period.

By hard copy: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R1–ES–2020–0050, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and locate the docket folder for FWS–R1–ES–2020–0050.

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, Division of Conservation and Classification, U.S. Fish and Wildlife Service, Falls Church, VA 22041, telephone 703–358–2172. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On January 15, 2021, we published a final rule (86 FR 4820) revising critical habitat for the northern spotted owl by excluding additional areas from designation as critical habitat pursuant to the Secretary of the Interior’s authority under section 4(b)(2) of the ESA (16 U.S.C. 1531 et seq.). On January 20, 2021, the White House issued a memorandum instructing Federal agencies to consider postponing the effective date after January 20, 2021, of any rules that have published in the *Federal Register* but not yet taken effect, for the purpose of reviewing any questions of fact, law, and policy the rules may raise (86 FR 7424; January 28, 2021) (“Regulatory Freeze Memorandum”).

One of our rules, the revised designation of critical habitat for the northern spotted owl, was published in the *Federal Register* but has not yet taken effect so it is subject to review (86 FR 4820; January 15, 2021). A review of this rule is particularly warranted because of the considerable change between the proposed rule and the final rule. Specifically, on August 11, 2020, the Service proposed a rule to exclude 204,653 acres (82,820 hectares) in 15 counties in

Oregon from the species' designated critical habitat (85 FR 4847; August 11, 2020). The final rule excludes approximately 3,472,064 acres (1,405,094 hectares) in 14 counties in Washington, 21 counties in Oregon, and 10 counties in California from the species' designated critical habitat (86 FR 4820; January 15, 2021). The additional areas excluded in the final rule (more than 3.2 million acres) and the rationale for the additional exclusions were not presented to the public for notice and comment. We are considering whether the public had appropriate notice in the proposed rule such that the determinations made in the final rule were a "logical outgrowth" of the proposed rule. We note that several members of Congress expressed concerns regarding the additional exclusions, among other concerns, which they identified in a February 2, 2021, letter to the Inspector General of the Department of the Interior seeking review of the rule.

We have also received at least two notices of intent to sue from interested parties regarding allegations of procedural defects (among other potential defects) with respect to our rulemaking for the final critical habitat exclusions. The Service has been sued each time it has issued a final rule regarding critical habitat for the northern spotted owl. These suits include challenges to the initial designation in 1992 (57 FR 1796; January 15, 1992) (see, e.g., *Trinity County Concerned Citizens v. Babbitt*, 1993 WL 650393 (D.D.C. 1993)), a revision in 2008 (73 FR 47326; August 13, 2008) (see *Carpenters Industrial Council v. Kempthorne*, No. 1:08-cv-01409 (D.D.C.)), and the revision in 2012 (77 FR 71876; December 4, 2012) (see *Pacific Northwest Regional Council of Carpenters v. Bernhardt*, No. 1:13-cv-00361 (D.D.C.)).

In light of the litigation history of northern spotted owl critical habitat designations, the clear intentions from some parties to file suit to challenge the January 15, 2021, Final Rule, and other questions raised, we are reviewing whether the rulemaking was procedurally adequate. In particular, as noted above, we are reviewing whether the Final Rule was a "logical outgrowth" of the proposal and whether the public had fair notice and an opportunity to comment on the expansive change in both location and amount of areas excluded from critical habitat, as well as the rationale for those changes. Extending the effective date of the January 15, 2021, Final Rule

while the Service reconsiders it may avoid unnecessary litigation challenging a rule that may change, which could conserve judicial, public, and agency resources.

We are, therefore, delaying the effective date of the final rule we published on January 15, 2021, that revised the designation of critical habitat for the northern spotted owl under the ESA (86 FR 4820), to give us time to consider questions of law, policy, and fact in regard to that final rule. The original effective date of the rule was March 16, 2021; with this document, we are delaying the effective date of the rule until April 30, 2021.

This 45-day delay of the January 15, 2021, Final Rule—based on the good cause articulated below—is for the purpose of reviewing any questions of fact, law, and policy that are raised by that rule as well as the effect of the delay, consistent with the Regulatory Freeze Memorandum and OMB Memorandum M–21–14. During this period, we will continue to gather information to determine whether any further steps should be undertaken, including whether there is a need to postpone the effective date further to give us additional time to reconsider the rule. To that end, we invite the public to submit comment on any issues of fact, law, or policy raised by the January 15, 2021, Final Rule, including, without limitation, the following:

(1) In a January 21, 2021, memorandum (OMB M–21–14) addressing steps agencies should take in response to the Regulatory Freeze Memorandum in reviewing recently finalized rules, OMB requires agencies to consider, among other things, whether the rulemaking process was procedurally adequate, including by taking final action that was a logical outgrowth of the proposal, and whether interested parties had a fair opportunity to present contrary facts and arguments. We, therefore, invite comment on whether you think procedural issues exist in the January 15, 2021, Final Rule rulemaking process and if so, what those issues are and what the Service could do to remedy them.

(2) Whether the Service should extend the effective date of the January 15, 2021, Exclusions Rule beyond April 30, 2021, and, if so, for how long and what, if any, the impacts of that delay would be.

(3) Whether the Secretary's conclusions and analyses in the January 15, 2021, Final Rule were consistent with the law, and whether the Secretary properly exercised his discretion under section 4(b)(2) of the ESA in excluding the areas at issue from critical habitat.

(4) Whether, and with what supporting rationales, the Service should reconsider, amend, rescind, or allow to go into effect the January 15, 2021, Final Rule.

II. Good Cause Under the Administrative Procedure Act

Our implementation of this action extending the effective date of the revisions to the northern spotted owl critical habitat rule from March 16, 2021, until April 30, 2021, without opportunity for public comment, effective immediately upon publication in the *Federal Register*, is based on the good-cause exception provided in the Administrative Procedure Act (APA). Pursuant to 5 U.S.C. 553(b)(B) and (d)(3), we have determined that good cause exists to forgo the requirements to provide prior notice and an opportunity for public comment on this 45-day delay in the effective date of the January 15, 2021, Final Rule, and to make this action announcing the delay effective immediately. Under the totality of the circumstances presented here, notice and comment would be both impracticable and contrary to the public interest because taking the time to provide for public notice and comment would prevent the Service from performing its functions, create confusion and disruption in the ESA section 7(a)(2) consultation process, and thwart the conservation purposes of the Act.

As noted above, we are reviewing whether the determinations made in the final rule were a “logical outgrowth” of the proposed rule. In addition, there has been substantial litigation in the past on critical habitat designations for this species, and we have already received two notices of intent to sue to challenge the January 15, 2021, Final Rule. Our agency’s “due and required” execution of its functions under the ESA would be unavoidably prevented if we allow the effective date to be triggered without the thorough review described above. *See* S. Doc. No. 248, 79th Cong., 2d Sess. At 200 (1946). That is, if the January 15, 2021, final exclusions from designated critical habitat of more than 3 million acres of northern spotted owl habitat become

effective, there is the potential that we will not have met our obligations under the Act to provide required protections for listed species. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978) (in enacting the ESA, it is “beyond doubt that Congress intended endangered species to be afforded the highest of priorities”). Specifically, once the exclusions become effective, Federal agencies will no longer be required to consult with the Service under section 7(a)(2) of the ESA to determine if agency actions will result in the destruction or adverse modification of that formerly designated habitat. Federal agencies could thus proceed to undertake (or to authorize others to undertake) activities that would remove that habitat before the Service has the opportunity to reconsider whether those exclusions were appropriate in the first place. Because the habitat is defined by forested stands, particularly of older trees, it cannot be replaced for many decades once removed. Even if the final exclusions rule were to become effective only briefly such that immediate implementation of habitat-removal activities would be unlikely or limited, having areas previously designated be excluded, then reconsidered and potentially included again, would cause confusion and disruption in the section 7(a)(2) consultation process, again impeding the Federal agencies from executing their conservation functions, and also affecting third parties reliant on the Federal agency activities.

Allowing the January 15, 2021, Final Rule to take effect would also undermine the citizen-suit procedures established in the statute. The Act provides that persons alleging a violation must provide 60-day notice of intent to sue (NOI) prior to filing suit. 16 U.S.C. 1540(g)(2)(C). The purpose of the notice requirement is to provide agencies with “an opportunity to review their actions and take corrective measures if warranted.” *Alliance for the Wild Rockies v. USDA*, 772 F.3d 592, 601 (9th Cir. 2014). As discussed above, we have received NOIs that, among other things, raise a substantial allegation of a notice-and-comment defect in the January 15, 2021, Final Rule. Upon initial review of the NOIs, the Service has concluded that it needs additional time to review the allegations in the NOIs to determine whether they have merit. However, notice and comment on this delay of 45 days would prevent

the Service from determining whether “corrective measures” are warranted before expiration of the 60-day period intended for this purpose. We are also considering whether we may need more time for review, and as noted above, therefore seek comment on whether we should further extend the effective date and, if so, how long the further extension should be.

Finally, it is important to recognize that excluding areas from critical habitat is not required by the ESA—the authority to exclude particular areas from designations of critical habitat under the second sentence of section 4(b)(2) of the ESA is in the discretion of the Secretary. (In contrast, other duties relating to critical habitat are mandatory: the duty for the Service to designate critical habitat, 16 U.S.C. 1533(a)(3), and the duty of Federal agencies to ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat, 16 U.S.C. 1536(a)(2).) Therefore, a delay in the effective date of the final rule excluding areas from critical habitat for the northern spotted owl does not delay compliance with a mandate of the Act. Delaying the effective date of the January 15, 2021, Final Rule, which purported to exercise that discretionary authority, simply preserves the status quo while we undertake additional review to ensure compliance with the legal mandates and conservation purposes of the ESA.

In sum, we find that the totality of the circumstances here—the history of litigation and newly threatened suits, the potential for a “logical outgrowth” problem in the final rule, and the threat to the Service’s execution of its statutory functions, among other issues—indicate that there is good cause to forgo notice and comment procedures here because it is impractical and contrary to the public interest for the Service to provide notice and an opportunity to comment on an extension of the effective date of March 16, 2021, for the January 15, 2021, Final Rule.

We also find that there is good cause to make this rule effective immediately instead of waiting until 30 days after publication for it to become effective. The APA normally requires this 30-day “grace period” so as to give affected parties time to adjust their behavior before a

final rule takes effect. See, e.g., *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992). However, the APA provides an exception to this 30-day grace period for good cause. 5 U.S.C. 553(d). There is good cause to allow this extension of the January 15, 2021, Final Rule's effective date to go into effect immediately because it preserves the status quo, and there is no change to which parties would need time to adjust their behavior. Further, if this rule extending the effective date were itself not to become effective for 30 days, it would mean that the January 15, 2021, Final Rule would go into effect on March 16, 2021. That would create the same issues as discussed in the preceding paragraphs, i.e., prevent the Service from performing its functions, create confusion and disruption in the ESA section 7(a)(2) consultation process, and thwart the conservation purposes of the ESA.

We therefore conclude that we have good cause to issue this final rule, effective immediately, extending the effective date of the January 15, 2021, Final Rule until April 30, 2021.

The White House memorandum also recommends that, for rules postponed for further review, agencies consider opening a 30-day comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by those rules, and consider any requests for reconsideration involving such rules. Consistent with this guidance, this rule provides notice and invites public comments on issues of fact, law, and policy raised by the rule, whether we should further extend the effective date, and, if so, how long the further extension should be. A delay in the effective date and opening of a new 30-day comment period is necessary to ensure that the public has the opportunity to provide, and the Service is able to consider, additional comments to fully inform the Service's decisions in light of current law and policy before the January 15, 2021, Final Rule becomes effective.

Public Comments

You may submit your comments and materials concerning this action by one of the

methods listed in **ADDRESSES**. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**. We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive will be available for public inspection on <http://www.regulations.gov>.

Authority

The authorities for this action are 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

Martha Williams,
Senior Advisor to the Secretary,
Exercising the Delegated Authority of the Director, U.S. Fish and Wildlife
Service.

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